Supreme Court, U.S.
FILED
JAN 26 19
JOSEPH F. SPANIOL
CLERK

No. 88-797

In the Supreme Court of the United States

OCTOBER TERM, 1988

RUSSELL VINCENT,
Petitioner,
vs.
STATE OF MISSOURI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

WILLIAM L. WEBSTER
Attorney General
State of Missouri
JOHN M. MORRIS, III*
Assistant Attorney General
State of Missouri
SCOTT L. TEMPLETON
Assistant Attorney General
State of Missouri
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Counsel for Respondent

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. WHETHER A TRIAL COURT MUST *SUA SPONTE*, MAKE INQUIRY OF THE PROSECUTING ATTORNEY TO EXPLORE THE POSSIBILITY OF PURPOSEFUL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES TO REMOVE VENIRE MEMBERS OF THE CRIMINAL DEFENDANT'S OWN RACE AFTER THE STATE SETS FORTH EXPLANATIONS FOR ITS STRIKES.
2. WHETHER THE MISSOURI COURT OF APPEALS ERRED IN DETERMINING THAT THE PETITIONER DID NOT HAVE STANDING TO CLAIM A VIOLATION OF HIS RIGHT TO EQUAL PROTECTION OF THE LAW CONCERNING THE STATE'S USE OF PEREMPTORY CHALLENGES UNDER CIRCUMSTANCES WHERE FIVE MEMBERS OF PETITIONER'S OWN RACE REMAINED TO SIT ON THE FINAL JURY PANEL.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
OPINION BELOW 1
STATEMENT OF THE CASE 2
ARGUMENT—

I. No Affirmative Fact Finding Inquiry on the Part of the Trial Court Is Required 3

A. Neither the Decision Below nor the Factual Record Raises the Question Presented in the Petition 3

B. The Hearing Conducted Met and Exceeded the Factual Inquiry Requirements of *Batson v. Kentucky* 4

II. A Showing of Prejudice Is Required Under *Batson* 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972) 6

Batson v. Kentucky, 476 U.S. ....., 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) 4, 5, 6, 8

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 7

Delaware v. Van Arsdale, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) 7, 8

Illinois v. Gates, 459 U.S. 1028, 103 S.Ct. 436, 74 L.Ed.2d 595 (1982) 3

Mapp v. Ohio, 367 U.S. 463, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) 7

Satterwhite v. Texas, ... U.S. ....., 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) 8

State v. Blackmun, 744 S.W.2d 482 (Mo.App., S.D. 1988) 7

State v. Butler, 731 S.W.2d 265 (Mo.App., W.D. 1987) 7

State v. Crump, 747 S.W.2d 193 (Mo.App., E.D. 1988) 7

State v. Payton, 747 S.W.2d 290 (Mo.App., E.D. 1988) 7

State v. Reliford, 753 S.W.2d 9 (Mo.App., W.D. 1988) 7

State v. Tolliver, 750 S.W.2d 624 (Mo.App., S.D. 1988) 7

No. 88-797

In the Supreme Court of the United States

OCTOBER TERM, 1988

RUSSELL VINCENT,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

OPINION BELOW

The opinion of the Missouri Court of Appeals affirming petitioner's conviction of possession of a controlled substance has been reported as *State v. Vincent*, 755 S.W.2d 400 (Mo.App., E.D. 1988).

STATEMENT OF THE CASE

Petitioner, Russell Vincent, was convicted of possession of a controlled substance in violation of § 195.020 RSMo. 1986. The facts related to this offense are summarized in the opinion of the Missouri Court of Appeals, Eastern District, *State v. Vincent*, 755 S.W.2d 400 (Mo. App., E.D. 1988) (Petitioner's Appendix D), and will not be restated here.

Additional facts relevant to petitioner's claims will be stated in respondent's Argument *infra*. Except as otherwise noted, respondent does not dispute that petitioner's contentions were raised before the Supreme Court of Missouri.

ARGUMENT

I. No Affirmative Fact Finding Inquiry on the Part of the Trial Court Is Required.

A. Neither the Decision Below nor the Factual Record Raises the Question Presented in the Petition.

Petitioner claims for the first time that the trial court failed to *sua sponte* question the Assistant Circuit Attorney concerning the use of her peremptory challenges to strike black venirepersons. Following the disclosure of the State's strikes, petitioner's counsel objected and called for the Assistant Circuit Attorney to explain the reasons for her strikes. The State voluntarily complied and petitioner's counsel made an extensive record by providing follow-up questions to each of the juror-by-juror responses. The trial court then overruled the objection. No exception was taken to the trial court's ruling on the objection without a further evidentiary hearing or inquiry by the trial court. Similarly, the issue was not considered by the Missouri Court of Appeals.

Thus missing from this case is the essential factual predicate of the Question Presented. This Court has "consistently refused to decide federal constitutional questions raised here for the first time on review of State court decisions". *Illinois v. Gates*, 459 U.S. 1028, 1029 n.2, 103 S.Ct. 436, 437 n.2, 74 L.Ed.2d 595 (1982). It follows that any action taken would constitute an impermissible advisory opinion. For this reason alone, this failure to present the question to any court below calls for denial of the petition.

B. The Hearing Conducted Met and Exceeded the Factual Inquiry Requirements of Batson v. Kentucky.

In *Batson v. Kentucky*, 476 U.S. ....., 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), this Court determined that the criminal defendant must establish a prima facie case of purposeful discrimination on the part of the prosecution. Upon making that showing, the burden passes to the prosecution to come up with a neutral explanation for the use of its peremptory challenge. From there, the trial court "will have the duty to determine if the defendant has established purposeful discrimination." *Id.* 106 S.Ct. at 1724. This Court expressly declined to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.*

It is clear from *Batson*, that no specific mechanism is required when the trial court carries out its duty to determine if the defendant has established purposeful discrimination. In the present case, petitioner's trial counsel carefully examined the Assistant Circuit Attorney's responses to support each of her six strikes. No indication was made to the trial court that this method of ascertaining the State's motive was in any way constitutionally deficient. It must be assumed that petitioner and the trial court were satisfied with the procedure undertaken to reach its conclusion that no discriminatory motive was shown. As petitioner has failed to plead facts indicating what additional questioning should have taken place or what additional evidence would have been adduced, it is wholly inappropriate at this final stage of review, to suggest that further inquiry should have been made.

II. A Showing of Prejudice Is Required Under Batson.

Petitioner next challenges the Court of Appeals' conclusion that he had no standing to bring a *Batson* challenge. The State utilized its peremptory challenges to strike six blacks but nonetheless the venire panel was made up of enough blacks that petitioner was tried before a jury consisting of five blacks and seven whites. As the evidence against petitioner was overwhelming and there was no racially sensitive issues present, the Court's ruling that no prejudice was alleged or shown is amply supported by the record and well within the confines of *Batson* and previous decisions of this Court.

In the opinion below, the Court of Appeals determined that petitioner had no standing to bring the *Batson* challenge as he had made no showing of prejudice as a result of the jury selection procedures. The Court noted the uncontroverted evidence against petitioner stating that "it stretches the concept of prejudice to the defendant beyond all reasonable limits to conclude that a different result would ensue, where unanimity by the jury is required, if the defendant had been allowed six or more black jurors instead of five." This conclusion is amply supported by the factual record as evidence established that three persons approached petitioner while he was standing on a sidewalk, handed him currency, and in return, petitioner handed each person a small, shiny package. Later, the officers arrested petitioner and seized a tin-foil packet containing cocaine and one hundred and thirty dollars in currency. Petitioner's defense consisted of unfounded argument that the State did not establish that petitioner had knowledge of the nature of the substance *found in his pocket*. As such,

the jury was given absolutely no basis to acquit petitioner.

The Court interpreted *Batson* as potentially protecting the equal protection rights of both the criminal defendant and the individual jurors allegedly stricken on account of their shared race. The Court concluded that *Batson* was not intended to make the defendant a vicarious guardian of rights other than his own, but was limited in application to situations where actual or implied prejudice has occurred in the defendant's criminal trial. The Court reasoned that the "overriding purpose of *Batson* is to assure the defendant that he will not be tried by a non-representative jury from which his race has been purposefully and discriminatorily removed."

Although the opinion below does not limit *Batson* to its facts, *Batson* presented an entirely different factual scenario. In *Batson*, this Court considered the most extreme situation in which all blacks were stricken so that the defendant was tried before an all white jury. This Court expressly stated the purpose of its decision was to determine on a case by case basis if permissibly neutral selection criteria produced the "monochromatic result." Quoting *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). This language suggests that the absence of a monochromatic result eliminates the need to make a *Batson* inquiry. Further, it indicates a need to evaluate the final composition of the jury in consideration of the equal protection claim.

Under the Missouri approach, one peremptory challenge could theoretically be utilized by the State to strike a black juror, but the defendant could nonetheless be

tried by a jury consisting of twelve blacks. See *State v. Crump*, 747 S.W.2d 193 (Mo.App., E.D. 1988). It is inconceivable to suggest that even assuming an equal protection violation as to that one strike, that a new trial would be required. To impose an absolute new trial requirement would be akin to the exclusionary rule for illegally seized evidence. See *Mapp v. Ohio*, 367 U.S. 463, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Such a requirement would not serve to ensure the plaintiff a fair trial, but would merely deter future violations from taking place. In no way does *Batson* indicate that such a rigid and far reaching penalty must be imposed for an equal protection violation. Further, it has been sufficiently impressed upon the prosecutors of this State that the use of peremptory challenges to strike minority members of the jury will not be tolerated. *State v. Payton*, 747 S.W.2d 290 (Mo.App., E.D. 1988); *State v. Blackmun*, 744 S.W.2d 482 (Mo.App., S.D. 1988); *State v. Tolliver*, 750 S.W.2d 624 (Mo.App., S.D. 1988); *State v. Butler*, 731 S.W.2d 265 (Mo.App., W.D. 1987); *State v. Reliford*, 753 S.W.2d 9 (Mo.App., W.D. 1988). It would serve no purpose to order a new trial on the facts of this case where the State's evidence was uncontradicted, no racially sensitive issues were present, and there is absolutely no indication that the jury was anything other than impartial.

The Court of Appeals' review for prejudice in the present case constitutes, in essence, application of the harmless error rule. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This type of judicial review "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdale*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436-37, 89 L.Ed.2d 674 (1986).

Application of this type of review has been limited by this Court only to circumstances where the alleged constitutional violations create "so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, ... U.S. ....., 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988).

This is not a situation where the supposed constitutional error permeated the entire judicial proceeding. To suggest otherwise is to foster the discriminatory attitude sought to be eliminated from criminal proceedings in *Batson*. Given the premise that the error was in fact harmless, a new trial in such situations would be ordered solely to allow petitioner an opportunity to solicit one black juror who would acquit him solely on account of their shared race. This result must not be tolerated as it encourages " 'litigants to abuse the judicial process and bestirs the public to ridicule it.' " *Delaware v. Van Arsdale, supra,* 106 S.Ct. at 1437. Both sides in criminal prosecutions must be made to recognize that jurors are jurors regardless of race. As there is no conflicting case law which might indicate that the harmless error rule does not apply in *Batson* cases, the petition for a writ of certiorari must be denied.

CONCLUSION

In view of the foregoing, the respondent submits that the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
State of Missouri
JOHN M. MORRIS, III
Assistant Attorney General
State of Missouri
SCOTT L. TEMPLETON
Assistant Attorney General
State of Missouri
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Counsel for Respondent